

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

HERMAN LEWIS,

Plaintiff,

v.

DR. N. RENDLEMAN, DAN DELP, JOHN
ROGERS and MARY BETH FLYGARE,

Defendants.

No. 4:16-CV-05136-EFS

ORDER DENYING MOTION FOR
RECONSIDERATION

Before the Court is Plaintiff's pro se Motion for Reconsideration, ECF No. 18. Plaintiff, a prisoner at the Coyote Ridge Corrections Center, is proceeding pro se and in forma pauperis; Defendants have not been served. Plaintiff is challenging the Order directing him to amend or voluntarily dismiss, denying his motion for appointment of counsel and also denying his request for immediate injunctive relief on the basis that he had failed to present a legally sufficient complaint. ECF No. 14.

In the Order filed December 29, 2016, ECF No. 14, the Court advised Plaintiff of the deficiencies of his complaint and directed him to amend or voluntarily dismiss within sixty days. On January 6, 2017, Plaintiff submitted a "supplemental complaint," consisting of five pages, ECF No. 15, and on January 9, 2017, he submitted a

1 "continuation of supplemental complaint," consisting of three pages,
2 ECF No. 16. On January 10, 2017, Plaintiff filed the present Motion
3 for Reconsideration, ECF No. 18, as well as a Notice of Appeal, ECF
4 No. 19. The Motion for Reconsideration was noted for hearing on
5 February 9, 2017. It was considered without oral argument on the date
6 signed below.

7 RECONSIDERATION

8 Motions for reconsideration serve a limited function. "[T]he
9 major grounds that justify reconsideration involve an intervening
10 change of controlling law, the availability of new evidence, or the
11 need to correct a clear error or prevent manifest injustice.'" *Pyramid*
12 *Lake Paiute Tribe v. Hodel*, 882 F.2d 364, 369 n.5 (9th Cir. 1989).
13 Such motions are not the proper vehicle for offering evidence or
14 theories of law that were available to the party at the time of the
15 initial ruling. *Fay Corp. v. Bat Holdings I, Inc.*, 651 F. Supp. 307,
16 309 (W.D. Wash. 1987).

17 In the instant case, Plaintiff has not alleged that there has
18 been an intervening change of controlling law. Likewise, he has not
19 offered newly discovered evidence that would justify this Court re-
20 examining the issue. Thus, the only remaining question is whether the
21 Court should alter its prior ruling in order to "correct a clear error
22 or prevent manifest injustice." *Pyramid Lake*, 882 F.2d at 369 n.5.

23 In his Motion, Plaintiff asserts that it is not an easy task to
24 write a complaint without the assistance of counsel. ECF No. 18 at 1.
25 While the Court appreciates Plaintiff's circumstances, they are not
26 unlike other incarcerated persons. He contends that his complaint "is

1 not just about deliberate indifference only but [his] medical
2 condition at hand," and the Court's directive is continuing his pain
3 and suffering. ECF No. 18 at 1.

4 In the absence of facts from which the Court could infer that
5 identified Defendants acted with deliberate indifference to
6 Plaintiff's suffering, the Court was unable to proceed with this
7 action. Consequently, Plaintiff was instructed to present a short and
8 plain statement of facts showing he was entitled to the relief he
9 sought. He has not done so.

10 Plaintiff has been suffering with problems and pain associated
11 with his Achilles tendon since October/November 2014, and has been
12 requesting to be seen by a podiatrist since that time. In his
13 complaint, Plaintiff averred that he was initially evaluated for
14 chronic tendonitis, given an icepack, instructed to elevate and
15 immobilize the region, and given a cane. ECF No. 1 at 5. When the pain
16 and swelling worsened, Plaintiff was seen by Defendant Dr. Rendleman
17 on October 28, 2014, who provided him with x-rays, an immobilization
18 splint and a wheelchair.

19 Plaintiff stated that on November 18, 2014, Defendant Dr.
20 Rendleman informed Plaintiff of the results of the x-rays (a rupture
21 and tear in the Achilles tendon) and instructed Plaintiff to use a
22 walking cane for the next three weeks. ECF No. 1 at 5. Plaintiff
23 indicated that on November 19, 2014, Defendant Dan Delp recorded that
24 the current modalities were not working (i.e., the walking boot and
25 cane were making matters worse) and allegedly noted the need for an
26 MRI and orthopedic evaluation. ECF No. 1 at 8. Plaintiff does not

1 state that he pursued a grievance regarding a MRI or orthopedic
2 evaluation at that time. In any event, it is unclear to this Court
3 how a determination could have been made that a walking boot and the
4 cane issued only the previous day were "making matters worse,"
5 especially in light of the fact that Plaintiff had been using a
6 wheelchair for the preceding three weeks.

7 Plaintiff indicated that on January 13, 2015, Defendant Dr.
8 Rendleman returned him to the wheelchair for an additional two weeks
9 due to pain and swelling. ECF No. 1 at 5-6. On January 27, 2015, the
10 Health Status Report (HSR) for a walking cane was renewed and
11 Defendant ARNP John Rogers instructed Plaintiff to keep taking non-
12 steroidal anti-inflammatory medications, as nothing else could be
13 done. ECF No. at 6. Defendant Rogers then informed Plaintiff that the
14 Care Review Committee would have to approve Plaintiff's request to see
15 a podiatrist, showed Plaintiff foot exercises and asked him to be
16 patient as it could take a year or longer for the Achilles tendon to
17 heal. ECF No. 1 at 6. The Court cannot infer from these allegations
18 that Defendants Rendleman and Rogers were deliberately indifferent to
19 Plaintiff's serious medical needs.

20 Plaintiff indicated that he continued with the walking cane,
21 exercises, and non-steroidal anti-inflammatory medications until his
22 body grew intolerant to the medications and he was told to stop taking
23 Ibuprofen. Plaintiff stated that he filed a grievance in June 2016,
24 seeking a second opinion from a podiatrist. ECF No. 1 at 6.

25 In response to the grievance, Plaintiff was seen by the medical
26 director on July 14, 2016, who signed Plaintiff up for physical

1 therapy. Plaintiff received a physical therapy session on July 19,
2 2016, at which he was told to continue his exercises, as there was
3 nothing more the physical therapist could do. ECF No. 1 at 6.

4 Plaintiff stated he pursued an additional grievance on July 28,
5 2016, due to worsening pain and swelling from the exercises. ECF
6 No. 1 at 7. Plaintiff asserted that on August 16, 2016, the physical
7 therapist informed Plaintiff that x-rays had revealed his Bursa broke
8 and was leaking synovial fluid, and the bone in the ankle joint was
9 pushing through, causing pain and swelling. ECF No. 1 at 7. The
10 physical therapist apparently indicated he would recommend surgery.

11 Plaintiff stated he submitted an additional grievance regarding
12 the physical therapist's information on August 16, 2016, ECF No. 1 at
13 7, but he does not state what became of the recommendation for
14 surgery. Plaintiff complained that his physical therapy session on
15 August 17, 2016, was cancelled. He did not state by whom.

16 Plaintiff indicated that his HSR for a cane expired on August
17 17, 2016, and he was summoned to medical on August 23, 2016, to pick
18 up a wheelchair. ECF No. 1 at 7. Although Plaintiff complained the
19 wheelchair HSR expired on September 13, 2016, it was renewed the
20 following day.

21 Plaintiff alleged that he was given another walking brace boot
22 on September 28, 2016, similar to what had been issued to him in
23 November 2014. Plaintiff complained that on October 3, 2016, Defendant
24 John Rogers informed Plaintiff the Care Review Committee had denied
25 his request to see a podiatrist, on the ground that the current
26 provision of a wheelchair and walking boot was satisfactory and that

1 Plaintiff's Achilles tendon could take years to heal. ECF No. 1 at 7.
2 The fact Defendant Rogers relayed this information does not support a
3 claim that Defendant Rogers was deliberately indifferent to
4 Plaintiff's suffering.

5 Plaintiff indicated that he sent yet another grievance on
6 October 3, 2016, complaining that the wheelchair and walking boot had
7 not worked in November 2014, and the pain and swelling had grown more
8 severe. ECF No. 1 at 8. Plaintiff also complained that the persons
9 who examined his ankle each time he sought medical attention since
10 October 2014, were not podiatrists. ECF No. 1 at 8.

11 Plaintiff averred that on October 6, 2016, he was informed a
12 level III grievance had been closed and he could not grieve the same
13 issue again. ECF No. 1 at 8. It is unclear to which of his numerous
14 grievances this referred. Although Plaintiff indicated his repeated
15 requests to see a podiatrist were denied, he made no further
16 assertions regarding the physical therapist's recommendation of
17 surgery, or other recommendations of an MRI or an orthopedic referral.

18 Rather, Plaintiff alleged the Defendants failed to properly
19 diagnose and treat his Achilles tendon by failing to allow him to see
20 a podiatrist. ECF No. 1 at 9. Plaintiff seems not to apprehend that
21 it was the Care Review Committee, the members of which Plaintiff did
22 not name as Defendants to this action, who denied his requests to see
23 a podiatrist. Plaintiff has not stated facts against the identified
24 Defendants sufficient to raise the inference that they were
25 deliberately indifferent to his suffering.

1 Instead, Plaintiff complained that due to Defendants'
2 negligence, his mobility declined and he was unable to exercise and
3 maintain his weight. Plaintiff claimed he sought stronger pain
4 medication from Defendant John Rogers, but did not state when this
5 occurred. ECF No. 1 at 9. He claimed Defendant Rogers prescribed
6 Ibuprofen without checking Plaintiff's medical record, which allegedly
7 indicated this medication might have been causing Plaintiff stomach
8 problems, and that Plaintiff had been told to stop taking it in 2016.
9 ECF No. 1 at 9. At worst, this might suggest negligence or medical
10 malpractice, neither of which would support an Eighth Amendment claim.
11 *See Hallett v. Morgan*, 296 F.3d 732, 744 (9th Cir. 2002) ("Mere
12 medical malpractice does not constitute cruel and unusual punishment."
13 (citation omitted)); *see also Wood v. Housewright*, 900 F.2d 1332, 1334
14 (9th Cir. 1990) (stating that even gross negligence is insufficient to
15 establish a constitutional violation); *McGuckin v. Smith*, 974 F.2d
16 1050, 1059 (9th Cir. 1992) (mere negligence in diagnosing or treating
17 a medical condition, without more, does not violate a prisoner's
18 Eighth Amendment rights), *overruled on other grounds by WMX*
19 *Technologies, Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997).

20 Plaintiff alleged no facts against Defendant Mary Beth Flygare
21 in his complaint. For the reasons set forth above, Plaintiff was
22 instructed to amend his complaint to state a claim upon which relief
23 may be granted. He did not do so. The "supplements" received on
24 January 6, and January 9, 2017, do not cure the deficiencies of the
25 initial complaint. Rather, they present allegations regarding
26 Plaintiff's medical treatment for breathing problems in late December

1 2016. They are inadequate as an amended complaint and it would appear
2 that the allegations presented in these "supplements" were not fully
3 exhausted at the time they were presented to the Court as required by
4 42 U.S.C. § 1997e(a).

5 Plaintiff alleges in the Motion for Reconsideration that he
6 requested an Orthopedic Consultation. ECF No. 18 at 1. Notably,
7 Plaintiff did not make this allegation in his complaint. Plaintiff
8 now also alleges Dr. Rendleman told him he was sending Plaintiff for a
9 MRI. ECF No. 18 at 2. Again, Plaintiff does not state when this
10 occurred. Regardless, an allegation that Defendant Dr. Rendleman was
11 sending Plaintiff for an MRI, by itself, would not support an
12 inference of deliberate indifference.

13 Plaintiff contends that when Defendants John Rogers, Mary Beth
14 Flygare, and Don Delp knew there was nothing more they could do, they
15 should have sent Plaintiff to a foot specialist for a consultation.
16 ECF No. 18 at 2. Plaintiff makes no allegation that they had
17 authority to order such a consultation. Indeed, Plaintiff had
18 indicated in his complaint that it was the Care Review Committee which
19 denied his requests to see a podiatrist. ECF No. 1 at 8.

20 Plaintiff now asserts that the delay in receiving a MRI and
21 orthopedic consultation for two and a half years establishes his
22 Eighth Amendment claim, ECF No. 18 at 3. He further alleges that it
23 was the Care Review Committee which denied his request for a MRI and
24 orthopedic consultation. ECF No. 18 at 3. Plaintiff, however, did
25 not state in his complaint when he made these requests, to whom, or
26 when they were denied. Furthermore, he does not name as Defendants to

1 this action, individual members of the Care Review Committee or
2 present facts from which the Court could infer they denied him
3 medically necessary treatment in deliberate indifference to his
4 suffering.

5 As his claims were initially presented to this Court, Plaintiff
6 did not allege facts which stated a claim for relief. Rather, he
7 asserted negligence in the failure to provide him an appointment with
8 a podiatrist. The Court finds reconsideration of the Order to Amend
9 or Voluntarily Dismiss, or the denial of immediate injunctive relief
10 in the absence of a legally sufficient complaint to be unwarranted.
11 ECF No. 14.

12 Therefore, **IT IS HEREBY ORDERED:** Plaintiff's Motion for
13 Reconsideration, **ECF No. 18**, is **DENIED**.

14 **IT IS SO ORDERED.** The Clerk of Court is directed to enter this
15 Order and furnish copies to Plaintiff and the Ninth Circuit Court of
16 Appeals. This action shall be stayed pending resolution of Plaintiff's
17 appeal.

18 **DATED** this 9th day of February 2017.

19
20 s/Edward F. Shea
EDWARD F. SHEA
21 Senior United States District Judge
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